

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2005-111543-001 DT

06/20/2016

HON. SAM J. MYERS

CLERK OF THE COURT
A. Gonzalez
Deputy

STATE OF ARIZONA

JULIE A DONE

v.

JOHN VINCENT FITZGERALD (001)

RANDALL JAY CRAIG
COLLEEN CLASE

CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-PCR
VICTIM WITNESS DIV-AG-CCC

RULING / PCR MATTER / CAPITAL CASE

The Court has reviewed the Defendant's Motion for Hearing to Determine Competency to Proceed in State Post-Conviction Proceedings and to Stay All Other Proceedings Until Such Time as Competency May Be Regained filed 5/16/2016, the State's response filed 5/27/2016, the Crime Victims' response filed 5/26/2016, and the defendant's replies to each response, both of which were filed 6/13/2016. The Court does not require oral argument to decide this motion.

The defendant was convicted of first degree premeditated murder and sentenced to death by jury verdict. On automatic appeal, the conviction and sentence were affirmed. *State v. John Vincent Fitzgerald*, 232 Ariz. 208, 303 P.3d 519 (2013). The defendant has not yet filed a petition for post-conviction relief. His petition is currently due July 7, 2016.

Defendant claims that he is not currently competent to pursue post-conviction relief, and seeks a stay of the post-conviction proceedings pending determination of his competency.

The State (1) requests that the Court conduct a colloquy with the Defendant in order to determine his competency; (2) claims that competence is context-dependent and that a standard lower than *Dusky* applies in post-conviction proceedings; (3) claims that the defendant has the burden of proof as to incompetence; and (4) requests denial of the stay request.

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The Crime Victims oppose a stay and cite their rights under the Arizona Constitution and statutes.

The colloquy request

Before addressing the issue of competency in the post-conviction context, the Court addresses the State's request that the Court conduct a colloquy with the defendant in order to observe him and ascertain his competence.

Case law provides that the court is a *de facto* witness and may consider its own observations in making a competency determination. *State v. Glassel*, 211 Ariz. 33, 116 P.3d 1193 (2005). Doubts about a defendant's competence may be removed by his conduct in court proceedings. *See State v. Conde*, 174 Ariz. 30 (Ct.App. 1992).

THE COURT FINDS, however, that transporting the defendant to court in order to observe his behavior on a single occasion would be of little value. The Court finds that conducting a colloquy with a defendant who has allegedly declined to cooperate with experts and counsel over an extended period of time in order to determine whether he may be competent or malingering would not be beneficial.

Competency determination in post-conviction proceedings

In support of his claim the defendant cites *Rohan v. Woodford*, 334 F.3d 803 (2013), a 9th Circuit decision. *Rohan* was abrogated by *Ryan v. Gonzales*, 133 S.Ct. 696 (2013). In *Ryan (Gonzales)* the Supreme Court considered whether the incompetence of a state prisoner required a stay of federal *habeas* proceedings. The Court considered the nature of a habeas proceeding, the nature of the claims raised and the interests of the state. *Ryan (Gonzales)* held that defendant's right to competence derives, if at all, from the constitutional right to due process rather than from the Sixth Amendment right to counsel. The U.S. Supreme Court held that a state prisoner does not have a statutory right to competence in *habeas* proceedings.

The Court has located a single Arizona decision that addresses post-sentencing competence, *State v. White*, 168 Ariz. 500, 509, 815 P.2d 869, 878 (1991) *abrogated* [on proportionality grounds] by *State v. Salazar*, 173 Ariz. 399, 844 P.2d 566 (1992). *White* held that due process was not violated by defendant's incompetence during the appellate process. In *White*, a death penalty case:

Defendant argues that he was denied due process of law because this court refused to order a mental examination after a *prima facie* showing of incompetency to assist in the appeal. Defendant concedes, however, that a "criminal appeal should proceed even if

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appellant is incompetent to assist counsel.” Defendant appears to raise the issue only to establish the groundwork for possible post-conviction relief.

The Michigan Court of Appeals addressed this issue in *People v. Newton*, 152 Mich.App. 630, 394 N.W.2d 463 (Ct.App.1986), *vacated on other grounds*, 428 Mich. 855, 399 N.W.2d 28 (1987). The Michigan court concluded that, although the issue was novel, it would be unwise to require that defendant be competent to assist counsel in preparing his appeal. *Id.* at 635–636, 394 N.W.2d at 466. The court reasoned that the only remedy it could fashion would be to suspend defendant's appeal until he regained his competency. *Id.* Because this would work to defendant's detriment, the court held that an appeal should “proceed regardless of a defendant's competency.” *Id.* We agree. Suspending the appeal would preclude this court from considering even the most clearly reversible or prejudicial error until the defendant regained competency.

Moreover, we note the American Bar Association's position, as expressed in the *ABA Criminal Justice Mental Health Standards* (1989). *Standard 7–5.4(c)* provides that:

Mental incompetence of the defendant *during the time of appeal* shall be considered adequate cause, upon a showing of prejudice, to permit the defendant to voice, *in a later appeal or action for postconviction relief*, any matter not raised on the initial appeal because of the defendant's incompetence.

(Emphasis added). The *Standard* contemplates that an appeal proceed despite a defendant's incompetence to assist the appeal. “[C]onvicted defendants, like parties to appellate litigation in general, do not participate in appeal proceedings.” *Id.*, *Commentary Introduction*. Therefore, “mental incompetence rarely affects the fairness or accuracy of decisions.” *Id.* Defendant was not denied due process of law.

State v. White, 168 Ariz. 500, 509, 815 P.2d 869, 878 (1991) *abrogated* [on proportionality grounds] by *State v. Salazar*, 173 Ariz. 399, 844 P.2d 566 (1992).

The defendant distinguishes *Ryan (Gonzales)* because it addresses habeas proceedings. The Court disagrees. The Court finds that a Rule 32 proceeding is more akin to either a habeas proceeding or to an appeal than to a trial. An appeal is based on the Court's rulings at trial; a post-conviction proceeding is - most typically - based on trial counsel's actions at trial. Both an appeal and a PCR proceeding are record-based and ask, “What occurred at trial?” In 1984, when IAC claims were made on appeal, our Supreme Court compared and contrasted Rule 32 proceedings with the right to appeal:

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Before we address the issues presented in the instant case, a review of Rule 32's functions and requirements would be beneficial. The Rule's functions can be understood, in part, by contrasting the Rule with the function of an appeal.

Although both Rule 32 and the right to appeal are legal devices designed to ensure that every defendant is afforded due process of law, each device has its own usefulness and requirements. In Arizona, the appeal is the post-conviction proceeding of primary importance. The right to appeal is guaranteed by our constitution, Ariz. Const. art. 2, § 24, but the Rule 32 procedure is not. The right to appeal is of such importance that after sentencing, the judge must inform the defendant of his right to appeal, see Rule 26.11(a), and “[h]and the defendant” written notice of his rights concerning appellate review, Rule 26.11(c), and how “to exercise them” *Id.* There is no comparable requirement for Rule 32.

Rule 32 is separate and apart from the right to appeal, *see State v. Gause*, 112 Ariz. 296, 541 P.2d 396 (1975), *cert. denied*, 425 U.S. 915, 96 S.Ct. 1515 (1976), and it is not designed to afford a second appeal, *see State v. Salazar*, 122 Ariz. 404, 406, 595 P.2d 196, 198 (App.1979), *vacated on other grounds*, *State v. Pope*, 130 Ariz. 253, 256, 635 P.2d 846, 849 (1981). It is not intended to unnecessarily delay the renditions of justice or add a third day in court when fewer days are sufficient to do substantial justice. *See State v. Guthrie*, 111 Ariz. 471, 473, 532 P.2d 862, 864 (1975). In all cases, civil or criminal, there must be an end to litigation. *See State v. Scrivner*, 132 Ariz. 52, 643 P.2d 1022 (App.1982).

The type of issues an appellant can raise in an appeal and the number of issues an appellant can raise are not limited by a per se rule. *Cf.* Ariz. Const. art. 2, § 24; A.R.S. § 13-4031; Rule 31.13(c)(1)(iv) (none of which set any limits on appeal). As a long-standing practice, however, this court, like other appellate courts, will not tolerate a party's presentation of claims that have no arguable merit. If meritorious, we will consider a claim even if the claim ultimately does not constitute reversible error. The type of issues a petitioner may raise in a Rule 32 petition are limited by court rule. *See* Rule 32.1.

This indicates that the appeal is the preferred method for presenting claims of reversible error. This preference is based on the important consideration of judicial economy and other valid, practical considerations.

If a defendant raises all arguable claims in the first appeal, the appellate court will be better able to make a determination as to whether the defendant has had a fair trial. Once decided, the court's docket will not be filled with repetitious actions. *See State v. McFord*,

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132 Ariz. 132, 644 P.2d 286 (App.1982) (seventh Rule 32 petition dismissed). Because the appeal is so important, the courts are charged with informing the defendant of his appellate rights. Thus, our rules are designed to facilitate prompt, full, appellate consideration.

Also, appeals must be filed shortly after conviction; Rule 32 petitions are often filed, as in this case, years after the trial. When the appeal is filed, the witnesses' memories and evidence are fresh and readily available should a new trial be required. When a Rule 32 petition is filed, the witnesses' testimony may be lost because of dimmed memories or death and physical evidence may be lost, destroyed, or misplaced.

In summation, appeal is designed to give prompt, full appellate review to those who have grounds to believe they have not had a fair trial. Important policy considerations require that all claims be raised in the appeal. Rule 32 "is designed to accommodate the unusual situation where justice ran its course and yet went awry." *Id.* at 133, 644 P.2d at 287. Rule 32 is a safeguard in addition to the many others that are part of our system, but it may not be abused.

State v. Carriger, 143 Ariz. 142, 145-46, 692 P.2d 991, 994-95 (1984) (decided at time when IAC claims were to be presented on appeal).

THE COURT FINDS that post-conviction proceedings focus primarily on what occurred at trial, which is part of the record. Just as the criminal appeal proceeds despite a defendant's claim of incompetence, the Court finds that post-conviction proceedings will proceed despite the defendant's claims of incompetence.

Ability to assist counsel, as raised by defendant

Were the Court to make a competency determination, the defendant asks the Court to focus on the second *Dusky* prong, the "ability to assist counsel" in connection with the post-conviction proceedings.¹ The Court finds that *Dusky* is not implicated at this point in the post-conviction proceedings.

¹ Due process requires that the state "observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent." *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 904 (1975). The inquiry is whether defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as a factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 403, 80 S.Ct. 788, 789 (1960).

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The defendant's entitlement to post-conviction relief is governed by Rule 32 of the Arizona Rules of Criminal Procedure. *Canion v. Cole*, 210 Ariz. 598, 599, 115 P.3d 1261, 1262 (2005). Only if a defendant raises claims that the reviewing judge finds to be colorable do certain rights arise, such as to seek discovery in order to supplement the record:

Because no petition has been filed, Canion has neither established good cause for discovery nor made a colorable claim that he is entitled to post-conviction relief. Like others who seek Rule 32 relief, Canion must file his petition, complete with affidavits and relevant portions of the record that establish a ground that would provide a basis for relief under Rule 32.

Canion v. Cole, 210 Ariz. 598, 601, ¶ 18, 115 P.3d 1261, 1264 (2005).

Defendant claims that he is unable to assist counsel, but provides no indication of the assistance that he is unable to provide at this stage of the proceedings. Defendant is represented by counsel. The current posture of the case requires filing a petition after reviewing the trial record. Filing the petition can be accomplished by counsel with legal training, the ability to conduct legal analysis and the ability to file pleadings. There is no indication that Defendant's assistance at this stage of the proceedings is essential.

Once the pleadings are complete, the Court will review the pleadings to identify those claims that may be precluded and those that are colorable. In making its determination, the Court will review "the petition, response, reply, files and records" to initially "identify all claims that are procedurally precluded" and then "after identifying all precluded claims, [the Court will] determine" whether the remaining claims are colorable, whether they present a material issue of fact or law such that an evidentiary hearing is required or whether the claims are not colorable and the petition will be dismissed. Rule 32.6, Ariz.R.Crim.P. Again, Defendant's assistance in conducting the review, whether competent or incompetent, is not necessary.

Just as *Canion* held that Rule 32 itself does not provide a process for obtaining Rule 15.1 discovery in PCR proceedings, so, too, the Court finds that Rule 32 does not provide a process for determining a defendant's competence in PCR proceedings.

THE COURT FINDS that at this stage of the current proceedings Defendant's competence is not necessary to assist PCR counsel or the Court.

THE COURT FINDS that Defendant does not have a right to a competency determination at this point in a post-conviction proceeding.

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Reviewing the record and conducting an independent investigation may disclose many issues, especially as to IAC, which is the most frequent allegation. To the extent that additional issues may be discovered at a later date and the defendant is able to establish grounds under Rule 32.2(b) sufficient to permit a successive petition, the defendant has a remedy and may seek permission to file a successive petition.

Crime victim's rights

The Court's findings advance the matter toward eventual resolution, recognizing the victim's rights to a speedy trial (resolution) without adversely affecting the defendant's rights. A.R.S. §13-4435(A); Rule 39(b)(15) ("[A victim's rights include:] The right to a speedy trial or disposition and prompt and final conclusion of the case after conviction and sentence.")

Ryan (Gonzales) considered the detriment to the State and *White* considered the detriment to the defendant should an indefinite stay be issued. The Court additionally considers the detriment to the victim or victims should an indefinite stay issue.

THE COURT FINDS that issuance of an indefinite stay to resolve competency at this stage of the proceedings would be detrimental to the State, the defendant and any victims.

CONCLUSION

Defendant is represented by competent and experienced counsel who is capable of reviewing the record, conducting an investigation, and identifying potential claims to be raised in a post-conviction petition.

Defendant has not established that his assistance is required at the stage at which the post-conviction proceedings are currently postured.

Finally, THE COURT FINDS that issuance of an indefinite stay would be detrimental to the State, Defendant and any victims. If requested, the Court would entertain a request for a limited stay to address the aforementioned issue of law if the Defendant wishes to challenge the Court's ruling.

Based on the above,

IT IS ORDERED denying the defendant's Motion for Hearing to Determine Competency to Proceed in State Post-Conviction Proceedings and to Stay All Other Proceedings until Such Time as Competency May Be Regained.

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IT IS FURTHER ORDERED affirming the **Capital Case Petition for Post-Conviction Relief Review Hearing** on **JULY 7, 2016, at 10:30 a.m. *time certain*** before the HON. SAM J. MYERS, SCT 5A.